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No. 91-406

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

BRUCE L. WALLACE,

Respondent.

BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a railroad may properly be held liable under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* ("FELA"), for damages allegedly sustained by an employee aboard a locomotive based on the railroad's failure to comply with a regulation issued under the Occupational Safety and Health Act, 29 U.S.C. § 651, *et seq.* ("OSHA"), where another federal agency (the Federal Railroad Administration, or "FRA") has exercised plenary authority over all facets of locomotive safety by issuing and enforcing standards and regulations under the Boiler Inspection Act of 1911, 45 U.S.C. § 23, *et seq.* ("BIA") and the Federal Railroad Safety Act of 1970, 45 U.S.C. §421, *et seq.* ("FRSA"), given that OSHA, by its terms, does not apply "to working conditions with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards affecting occupational safety or health." 29 U.S.C. § 653(b)(1).

2. Alternatively, whether a violation of an OSHA regulation may properly be used as a basis upon which to impose liability on a railroad under the FELA for an employee's workplace injury when OSHA explicitly declares that it shall not be construed to "enlarge or diminish or affect in any manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries . . . arising out of, or in the course of, employment." 29 U.S.C. § 653(b)(4).

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This brief of the Association of American Railroads and the National Association of Railroad Trial Counsel is filed with the consent of the parties, the letters expressing such consent having been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF AMICI CURIAE

The Association of American Railroads ("AAR") is a voluntary, unincorporated, non-profit trade organization, headquartered in Washington, D.C. Its members constitute the vast majority of the nation's railroads, operating approximately 85 percent of the line-haul mileage, producing approximately 93 percent

of the freight revenues and employing approximately 90 percent of the railway work force in the United States. In most areas of operation, AAR members are regulated exclusively by the Federal Railroad Administration ("FRA") under various railroad safety statutes. In particular, FRA regulates all facets of design, construction, inspection and safety of locomotives.

There are often differing requirements under FRA regulations and those issued by other federal agencies, and railroads clearly have an interest in—indeed a compelling need of—knowing with which regulations they must comply—those issued by FRA or those issued by other agencies under general subject matter grants of regulatory authority. This interest stems in part from the need to maintain a uniform national system of regulation necessary for nationwide safety and efficiency of railroad operations. Moreover, under the fault-based FELA,[1] a violation of an FRA safety regulation imposes absolute FELA liability for any injury caused in whole or in part thereby. Thus, AAR members have an obvious interest in the related question of whether they may be held liable under the FELA for injuries sustained on a locomotive allegedly caused by a failure to comply with generic OSHA

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[1] Past decisions by this Court require the following railroad safety statutes to be read *in pari materia* with the FELA: The Safety Appliance Act of 1893, 45 U.S.C. § 1, *et seq.* (*St. Louis, I.M. & S.R.Co. v. Taylor*, 210 U.S. 281 (1908)); the Boiler Inspection Act of 1911, 45 U.S.C. § 23, *et seq.* (*Lilly v. Grand Trunk Western Ry.*, 317 U.S. 481 (1941)); and the Hours of Service Act of 1907, 45 U.S.C. § 61, *et seq.*, (*Baltimore & O. Ry. v. Wilson*, 242 U.S. 295 (1916)). In addition, the Rail Safety Act of 1970, 45 U.S.C. § 421, *et seq.* ("FRSA") is so read by virtue of an express provision therein. 45 U.S.C. § 437(c).

requirements when they have fully complied with all FRA locomotive safety requirements.

The National Association of Railroad Trial Counsel is a voluntary, unincorporated, non-profit organization headquartered in Los Angeles, California. Its membership consists of more than 1,200 trial lawyers who represent all significant railroads operating throughout the United States. One of its principal objectives is to furnish railroad counsel with a forum for the study of the legal problems associated with railroad personal injury cases, including those filed by employees under the FELA and related statutes, with a particular focus on the substantive law and the strategy and tactics to be used in trials thereof.

STATUTES INVOLVED

Section 2 of the Boiler Inspection Act of 1911 provides:

> It shall be unlawful for any carrier to use or permit to be used on its line any locomotive, unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of this Act and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. [As

amended June 7, 1924, ch. 355, § 2, 43 Stat. 659.]

45 U.S.C. § 23.

Section 4(b)(4) of the Occupational Safety and Health Act of 1970 provides:

> Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death arising out of, or in the course of, employment.

29 U.S.C. § 653(b)(4).

SUMMARY OF ARGUMENT

Amici curiae agree with Petitioner that there are special and important reasons for review of the decision below. That decision upheld a FELA jury verdict that was prejudicially tainted by counsel's arguments and the trial court's instructions that the railroad could be found negligent for failing to comply with an OSHA regulation requiring a "hearing conservation" program not required under FRA's 1980 regulations on locomotive noise.[2]

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[2] The locomotive noise regulation in question (49 CFR § 229.121) was issued by FRA under its Locomotive Inspection Act authority along with other regulations pertaining to the details of various locomotive equipment and appurtenances. *See*, 45 Fed.Reg. 21,092, *et seq.*, (1980). FRA's discussion of the considerations involved in locomotive noise included the fact that

In addition to the conflicts described in the Petition, *amici curiae* submit yet an additional reason of critical importance warranting review of the decision below—its inconsistency with this Court's decisions on the federal statute specifically enacted to achieve locomotive safety. Under those decisions, this Court held that Congress occupied "the entire field" of locomotive safety by the complete delegation of regulatory authority over the same to the ICC under the 1924 amendments to the Boiler Inspection Act, 45 U.S.C. § 23, *et seq.* ("BIA").[3] Moreover, it is clear that when the FRSA was enacted in 1970, Congress intended to expand rather than contract FRA's regulatory authority. Finally, in addition to OSHA regulations having no application to a locomotive by reason of FRA's exercise of its regulatory jurisdiction, Congress expressly stated that OSHA was not to be

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less than 5% of in-service locomotives had noise in excess of the prescribed limits, opining that most of those could be brought into compliance by simple maintenance procedures such as improved seals and gaskets, electric panels, new methods of air brake piping, and relocation of the horn. *Id.*, at 21,105. FRA also rejected certain OSHA requirements pertaining to certain types of noise limits for the express reason that noise of the type involved "is normally not present in the locomotive cab," it being "normally associated with industrial processes." *Id.*, at 21,106.

[3] Boiler Inspection Act authority was originally delegated to the Interstate Commerce Commission ("ICC"). That authority was later redelegated to the Department of Transportation. *See*, 49 U.S.C.App. § 1655(e)(1)(d), and then sub-delegated by statute to the FRA, *see*, 49 U.S.C. § 103 (c)(1). With the passing of the steam engine, the Boiler Inspection Act is now often referred to as the "Locomotive Inspection Act," but to maintain its historical context, it will be generally referred to herein as "BIA."

construed to affect statutory liability for workplace injuries, like that imposed by the FELA.

ARGUMENT

I. FRA'S EXERCISE OF BOILER INSPECTION ACT AUTHORITY OVER LOCOMOTIVE SAFETY PRECLUDES OSHA NOISE REGULATIONS FROM APPLYING TO LOCOMOTIVE CABS

Just prior to the turn of the century, Congress entered the field of railroad workplace safety by establishing standards for certain railroad equipment (brakes, couplers, grab-irons, *etc.*) under the Safety Appliance Act of 1893, 45 U.S.C. § 1, *et seq.* Enforcement was delegated to the ICC. In 1911, Congress responded to additional railroad safety concerns by enacting the BIA, delegating to the ICC the supplemental power to inspect locomotive boilers. In 1924, Congress amended the BIA by delegating complete jurisdiction over every facet of locomotive safety to the ICC.[4] The ICC (and its statutory successor, the FRA) have continuously exercised that jurisdiction to this day.

In *Napier v. Atlantic Coast Line Ry.*, 272 U.S. 605 (1926), the Court reviewed the BIA's history, and held it to manifest a Congressional intent to "occupy the entire field" of locomotive safety:

> Does the legislation of Congress manifest the intention to occupy the entire field of regulating locomotive equipment? Obviously, it did not do so by the Safety Appliance Act, since its requirements are specific. It did not do

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[4] Act of June 7, 1924, ch. 355, §2, 43 Stat. 659.

> so by the original Boiler Inspection Act, since its provisions were limited to the boiler. [Citation omitted.] But the power delegated to the Commission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances.
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> * * *
>
> * * * The duty of the Commission is not merely to inspect. It is also to prescribe the rules and regulations by which fitness for service shall be determined. Unless these rules and regulations are complied with, the engine is not "in proper condition" for operation. Thus the Commission sets the standard. By setting the standard it imposes requirements. The power to require specific devices was exercised before the amendment of 1915, and has been extensively exercised since.

Id., at 611-12. *Napier*'s holding on the extent of the delegation to the ICC was further reinforced in *United States v. Baltimore & O. Ry.*, 293 U.S. 454 (1934), and later played a prominent role in establishing BIA's applicability to occupational disease cases brought under the FELA in *Urie v. Thompson*, 337 U.S. 163, 191-94 (1949).

Congressional concern with railroad safety culminated in 1970 with the enactment of FRSA. Two months later, the same Congress enacted OSHA.

By its terms, OSHA does not apply where another federal agency exercises statutory authority over working conditions:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce regulations affecting occupational safety or health.

29 U.S.C. § 653(b)(1). Statutory authority over locomotive safety has been exercised for many years by "another federal agency" (the ICC, and later the FRA) under the BIA's broad delegation of authority over locomotives. That authority has been exercised through orders and regulations on design criteria, construction, materials, tests, inspections, and safety standards pertaining to all parts and appurtenances of locomotives.[5] These have been enforced through civil penalties in amounts up to $20,000 per BIA violation. 45 U.S.C § 34. FRA's exercise of BIA and FRSA authority over locomotive safety simply makes OSHA inapplicable.

It is incongruous to require a railroad to comply with FRA locomotive regulations on a day-to-day basis, and, notwithstanding its compliance, later subject it to FELA liability for a failure to comply with OSHA requirements. This is particularly so when the OSHA requirements are set forth in a generic regulation which has nothing to do with locomotives. It is even more incongruous where, as here, the BIA standards issued by the ICC and FRA were designed not only to assure a maximum degree of safety for both rail-

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[5] *See*, 49 CFR §§ 223.1, *et seq.*; 229.1, *et seq.*; 231.15-.16; 231.29-.30; 232.10, *et seq.*; and 236.0, *et seq.*

road employees and the public, but also to accommodate the operating necessities and characteristics of complex railroad locomotive equipment.[6] The interplay between these factors caused Congress to delegate full jurisdiction and responsibility over locomotive safety originally to ICC, and in recent years to FRA. Thus, FRA's exercise of its BIA authority renders OSHA inapplicable by its very terms.

BIA's preemption of OSHA in matters relating to locomotive safety is paralleled in other areas, either where a specific subject-matter statute is involved (*e.g.*, the Safety Appliance Act governing brakes, couplers, grab irons, *etc.*), or where FRA has exercised its authority under a general railroad safety statute such as FRSA. While arguments can be made as to the extent to which FRA must act under FRSA before triggering OSHA's non-applicability provision (*see, e.g., Southern Railway Co. v. OSHRC*, 539 F.2d 335 (4th Cir. 1976) and other cases discussed in the

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[6] The safety considerations pertaining to a locomotive are complex, since they involve the safety of both the employee as well as the public. The question of locomotive noise is not isolated, as it involves both operating and safety factors. For instance, FRA requires for the public's safety a locomotive horn with a specified *minimum* level of loudness. 49 CFR § 229.129. FRA requires an air brake system which must be capable of being actuated immediately for stopping purposes, which entails noise, the sound of escaping high-pressure air. 49 CFR § 229.46. The FRA regulations also specify that certain in-cab warning alarm devices must be "clearly audible throughout the cab." 49 CFR § 236.513. These diverse considerations are reflected in the FRA standards for locomotive cab noise. 49 CFR § 229.121. It should be noted that the FRA has issued additional noise regulations covering *external* noises made by idling and moving locomotives. The standards vary, depending on the year the locomotive was manufactured. 49 CFR § 210.21, *et seq.*

Petition), it is clear that FRSA did nothing to diminish the FRA's long-standing exclusive authority over locomotive safety.

II. OSHA PROVIDES THAT IT SHALL NOT AFFECT IN ANY MANNER THE LIABILITY OF EMPLOYERS FOR WORKPLACE INJURIES

Assuming *arguendo* there was no preemption of OSHA by virtue of FRA's exercise of authority, allowing the jury below to base FELA liability on an OSHA violation raises an alternative, subsidiary issue of considerable importance - it is contrary to a statutory provision wherein Congress explicitly declared that nothing in OSHA:

> . . . shall be construed to . . . enlarge or diminish or affect in any manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries . . . arising out of, or in the course of, employment.

29 U.S.C. § 653(b)(4). Thus, the instructions and verdict below were clearly contrary to this statutory proscription. Despite the clarity of this Congressional mandate, some federal circuit decisions have sanctioned the affirmative use of OSHA regulations as a basis to affect employer and employee liability in personal injury cases.[7] There is scant support, however,

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[7] Notwithstanding the express terms of 29 U.S.C. § 653(b)(4), there is a deep split between the federal circuits on the effect to be given a violation of an OSHA regulation. *See, Minichello v. U.S. Trucking Industries, Inc.*, 756 F.2d 26, 29 (6th Cir. 1985) ("OSHA regulations can never provide a basis for liability because Congress has specified that they shall not."). *Compare Albrecht v. Baltimore & O. Ry.*, 808 F.2d 329, 332 (4th Cir.

to justify such a departure from such explicit statutory language, as statutory interpretation begins with the language of the statute itself. *Norfolk & Western Ry. v. American Train Dispatchers Ass'n*, ___ U.S. ___ ,111 S.Ct. 1156, 1163 (1991). Where the language of the statute is clear, "the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989)(quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

Moreover, OSHA's provision that it not "affect in any manner" common law or statutory claims (which includes FELA claims) is in marked contrast with FRSA (enacted just two months earlier) wherein the same Congress specifically directed that FRA's regulations "shall" substantially affect the liability of a railroad under the FELA:

> All . . . regulations . . . prescribed by the Secretary under this title . . . shall have the same force and effect as a statute for purposes of the application of sections 3 and 4 of the Act of April 22, 1908 [45 U.S.C. §§ 53 and 54] relating to the liability of common carriers by railroad for injuries to their employees.

45 U.S.C. § 437(c). Under 45 U.S.C. §§ 53 and 54, a violation of a FRA regulation issued pursuant to a railroad safety statute such as the BIA has a major effect in a FELA trial. In such a case, the employee

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1987) (violation of OSHA regulations may be considered as evidence of negligence, but not as negligence *per se*); and *Pratico v. Portland Terminal Co.*, 783 F.2d 255 (1st Cir. 1985) (violation of OSHA regulation is negligence *per se* and imposes absolute liability).

need prove only the violation and that his injury resulted in whole or in part therefrom. Such proof not only relieves the employee of the burden of proving negligence, but also renders contributory negligence inapplicable, so as to preclude the reduction of damages in proportion to the employee's contributory negligence. *See, Crane v. Cedar Rapids & Iowa City Ry.*, 395 U.S. 164, 166 (1969).[8] Given that the same Congress had recently mandated that a violation of a railroad safety statute *would* affect FELA cases, it defies reason to impose FELA liability on the basis of an OSHA regulation when Congress affirmatively provided that OSHA *should not be used* for such a purpose.

Thus, since the ruling below totally ignores the exclusive jurisdiction over locomotive safety exercised by FRA under the Boiler Inspection Act, and, alternatively, uses a violation of an OSHA regulation as the basis upon which to impose liability for workplace injuries under the FELA notwithstanding OSHA's express proscription against such use, it involves important questions of federal law warranting review by this Court.

CONCLUSION

For the foregoing reasons, *amici curiae* submit that the petition for a writ of *certiorari* should be granted.

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[8] Only the violation of a published FRA standard is given this effect. Proof of the availability of parts or appurtenances which are safer or more effective is insufficient to prove a BIA violation. *Baltimore & O. Ry. v. Groeger*, 266 U.S. 521 (1924).

Respectfully submitted,

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